IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 248 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANCHANBEN HARJIBHAI, WIFE OF RATILAL KESHAVAJI MAJETHIA

Versus

CHANDULAL PARMANAND UNAKAT

Appearance:

MR NAGIN N GANDHI for Petitioners

MR KV SHELAT for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 19/01/2001

ORAL JUDGEMENT

1. This appeal under Section 100 of the Code of Civil Procedure arises out of a judgment and deecree passed in Regular Civil Appeal No.74 of 1981, by the learned learned Assistant Judge, Amreli, on July 13,

1983. The said appeal arose out of a judgment and decree rendered by the learned Civil Judge (J.D.), at Dhari, in Regular Civil Suit No.149 of 1979, on April 29, 1981.

2. The repondent had preferred the said suit, at Dhari against the appellants for declaration and possession in respect of a suit property situate in Kasturbapara area of Chalala, bearing Panchayat House No.953 admeasuring 70' x 60', i.e. approximately 4200 sq. feet or 467 sq. yards. The plaintiff sought a declaration to the effect that he is the exclusive owner of the said property and sought a direction on the defendants to remove the lock that the defendants had applied to the said property. An alternative relief was sought in terms that if it is held that the defendants are in possession of the property, the possession of the said property may be handed over to the plaintiff from the defendants. The third relief was regarding mesne profit at the rate of Rs.15/- per month, besides costs of the suit.

3. The defendants' case in contrast to the plaintiff's case, as emerging from written statement (Ex.10) in the suit, is that the suit property was of exclusive ownership of the defendants' father-Harji Girdhar and was in possession for about a period of more than 15 years.

4. After considering the evidence led by both the sides, the Trial Court accepted the plaintiff's case and decreed the suit, declaring the plaintiff to be an owner of the suit property but not the sole owner. The Trial Court also directed the defendants to hand over the vacant and open possession of the suit house to the plaintiff on or before July 1, 1981 and that the amount of mesne profits would be fixed at the time of execution proceedings.

4.1 Aggrieved by the said judgment and decree, the defendants approached the District Court, Amreli, with Regular Civil Appeal No.74 of 1981. In the Regular Civil Appeal, the appellants gave an application Ex.24 under Order 6, Rule 17 of the Code of Civil Procedure, seeking permission of the Court to amend the written statement. It was contended in the said application that, in the written statement, a contention was already taken that the suit property was of ownership of the deceased father of the defendants, i.e. Harjibhai. It was also contended in the Lower Court, i.e. the Trial Court, at the time of the arguments, it was submitted on behalf of the defendants that in case the said property was held to

be not of sole ownership of deceased-Harjibhai Girdharlal, then it may be held to be property of joint ownership of Parmanand Girdharlal and Harjibhai Girdharlal, which would entitle the defendants 1/2 share in the said property. This contention was opposed to by the plaintiff's side, but, ultimately, considering the material on record, the Appellate Court deemed it proper to allow the amendment in the written statement.

5. After considering the rival side contentions, the Lower Appellate Court concluded that no error was committed by the Trial Court in holding that deceased-Harjibhai was only a licensee. The Lower Appellate Court also held that no error was committed by the Trial Court in holding that the suit was not time barred. Holding that the suit was not bad for non-joinder of parties was also held to be a correct conclusion. The Lower Appellate Court, ultimately, dismissed the appeal and confirmed the judgment and decree of the Trial Court.

5.1 Aggrieved by the said concurrent findings of the Courts below, the original defendants have approached this Court with this appeal.

6. This Court, while admitting this appeal, formulated the following two questions :-

(1) Whether the Lower Appellate Court was right in coming to the conclusion that the presumption of jointness arising under the Hindu Law has satisfactorily been rebutted?

(2) Whether the suit was barred by limitation ab initio?

6. Before proceeding to consider the contentions raised by learned advocates for parties, it would be appropriate, if certain facts of the case are narrated.

7. One Girdhar Jetshi was the common ancestor for both the sides. Girdhar Jetshi had two sons - Parmanand and Harji. Parmanand had two sons, one of whom is Chandulal, who is the plaintiff. Parmanand had two daughters. Parmanand's brother Harji had two daughters, Kanchan and Kusum. Thus, the plaintiff and the defendants are first cousins. The property in question is a Kachha house bearing Panchayat No.953 in Kasturba Para area of Chalala. According to the plaintiff, the said property was of exclusive ownership of his father Parmanand Girdhar. Harji was his uncle. Since the

plaintiff was staying abroad for a long time and Harji did not own a house and was in need of a house, the plaintiff permitted Harji to occupy the house. Harji's two daughters, Kanchan and Kusum (defendants No.1 and 2) were married and were staying at their marital house. Harji expired somewhere in November 1977, whereupon the house came to be locked by Ratilal Keshavlal Majethia. He disposed of the household cutlery and used to manage the property. When possession was demanded by the plaintiff, it was denied. There were exchange of notices and, ultimately, suit was preferred.

7.1 On the other hand, the case of the defendants' side is that the property was of exclusive ownership of Harji Girdhar and the plaintiff had no right whatsoever in the same. By virtue of amendment sought in the written statement, at the appellate stage, alternatively, it was contended that it was a joint family property of the family of Girdhar Jetshi and it was only being run in the name of Parmanand being an elder brother and, as such, the defendants have 1/2 share in the property.

8. Now, coming to the contentions raised by the rival sides, Mr. Gandhi, learned advocate appearing for the appellants has taken this Court through the judgments of both the Courts below as well as the records and proceedings. His contention is that, if the judgments of the Courts below are read, particularly, the judgment of the First Appellate Court, it fully supports the case of the defendants regarding the property being of the ownership of the undivided family and the defendants having 1/2 share in the property. As regards limitation, Mr. Gandhi submitted that, admittedly, the defendants have been in possession for a long time and the suit is not preferred for more than 12 years of dispossession and it is, therefore, time barred. Mr. Gandhi contended that there is evidence to show that the brothers were running a joint family business. This aspect is proved by contemporaneous record in the form of suits filed in the Court of law. The property was purchased in name of Parmanand Girdhar only because he happened to be the elder son and simply because it stood in the name of Parmanand Girdhar, it cannot be considered as his exclusive possession. He submitted that the Court below has failed to appreciate this aspect. Mr. Gandhi submitted further that, on one hand, the Court below holds that the plaintiff is not the sole owner of the property and, on the other hand, a decree of eviction is passed. These two things cannot go together and, therefore, the appeal may be allowed and the appellants' 1/2 share may be recognized. Mr. Gandhi, however,

submitted on instruction that the suit house has now fallen down and only ruins remain thereof.

9. Mr. Shelat, learned advocate appearing for the respondent, submitted that, if the evidence is perused, it would indicate that, prima facie, it may appear that a business was jointly run by Parmanand and Harji, but there is counter evidence to indicate that the house in question was not of joint ownership. He submitted that there is evidence to indicate that the property was purchased as a piece of land in 1925 in the name of Parmanand Girdhar (Ex.60). Over the said piece of land, the house in question was constructed and was occupied by Parmanand Girdhar. Upon demise of Parmanand Girdhar, as the plaintiff was a minor, his mother was appointed as Vahivat Karta. Mr. Shelat submitted that, if it was a joint property, it would not have happened. Instead of plaintiff's mother, Harjibhai's name would have been entered. Mr. Shelat submitted further that the stand of the defendants indicates their mala fides. Initially, they come with a case that Harji Girdhar was the exclusive owner of the property and only at a later stage, realising that no evidence is adduced in this regard in face of ample evidence to support the plaintiff's case, the defendants come with the case of the property being joint property. Mr. Shelat's contention, therefore, is that, sufficient evidence is there on record to rebut the case of the defendants of the property being a joint property. Under the circumstances, he submitted that the first question formulated by this court may be answered in the affirmative.

9.1 Coming to the question of limitation, Mr. Shelat submitted that a plain reading of the plaint and the evidence on record would indicate that dispossession is claimed only after demise of the defendants' father-Harji somewhere in November 1977 and the suit is filed in the year 1979 and, therefore, the defendants' case of the suit having been time barred may not be accepted.

9.2 As regards the contention raised by Mr. Gandhi that, on one end the Courts below have held that the plaintiff is the owner of the property but not the sole owner and still on the other end the Courts have passed a decree of eviction, which is not tenable, Mr. Shelat contended that the observation of the Lower Court to the plaintiff not being the sole owner has to be read in the context that he is not the sole successor of his father. Evidence indicates that he had one brother and four

sisters. However, none of them seem to have shown any interest in the property. So, the lack of sole ownership is to be read in this context and not qua the interest of the defendants and, therefore, there is no error on part of the Courts below. Mr. Shelat submitted that the appeal may, therefore, be dismissed.

10. What emerges for consideration by this Court is whether the contention of the defendants that suit property was a joint property could have been accepted or whether the said presumption of jointness is properly rebutted. In this regard, it appears that there are two pieces of evidence in form of process served in Civil Suits which indicate that Parmanand and Harji were running business in the name of Girdhar Jetshi. Parmanand was the elder brother and this was the only property at Chalala owned by the family and, therefore, a necessary presumption or inference is expected to be drawn that the property was of joint ownership. Against this, there is evidence to indicate that the property was purchased by Parmanand Girdhar in the year 1925 from one Bai Mani. Parmanand expired somewhere in 1937 and, at that time, the property came to be mutated to the name of the plaintiff. However, since the plaintiff was a minor, name of his mother Ambaben was entered into as the Vahivat Karta of the plaintiff. At that time, Ambaben had paid penalty in capacity of Vahivat Karta of Chandulal Parmanand for some illegal mutation in respect of the said property. These two documents are produced on record by husband of defendant No.1 which, according to him, were collected by him when he had gone to Chalala on demise of Harji Girdhar, his father-in-law. If the case of the defendants is right, on demise of Parmanand, the property would not have been mutated to the name of Chandulal (the plaintiff) nor would his mother have been indicated as Vahivat Karta because Harji, younger brother of Parmanand was very much alive. If it was a joint family property, the property would have been mutated to his name as the eldest in the family and there was no question of the plaintiff's mother being shown as Vahivat Karta of the plaintiff. It is also to be noted that, at this stage, Harji does not take any objection to the property being mutated to the name of Chandulal. Contemporaneous record of assessment register also indicates that the property stands in name of Chandulal. Excepting the true copies of plaint and decree in two different suits indicative of the two brothers Parmanand and Harji running the shop of deceased Girdhar Jetshi, there is no other evidence to indicate any interest of the defendants in the suit property. These two documents cannot be considered as sufficient to hold that the suit

property is of ownership of joint family and the defendants will have 1/2 share in the same.

11. Besides this, the conduct of the defendants also requires to be noted. Initially, they come with a case that deceased-Harji Girdhar was the exclusive owner of the suit property. After the trial is over and and decree is passed, at the Appellate stage, they come with a case that it was a joint family property. In this context, it is required to be noted that it has come on evidence through documents at Ex.58 and Ex.60, that penalty was paid by mother of the plaintiff and Parmanand Girdhar purchased the property wherein possession of husband of defendant No.1 is shown, and despite this, when served with a notice, they called upon the plaintiffs to produce evidence of title, if any, knowing fully well that the documents are in their possession.

12. In view of the discussion above, it is not possible to accept this appeal on the count that the Court below has erred in holding that the presumption under Hindu Law about the jointness of the property has been properly rebutted. Question No.1 is, therefore, answered in the affirmative.

13. As regards the 2nd question formulated by this court, there is sufficient material to indicate and not much disputed by the defendants-appellants that the house was in possession of Harji Girdhar till he expired in November 1977. But disputes arose only thereafter. The suit came to be filed on 17th October, 1979. Therefore, within less than two years the suit came to be filed and, therefore, the contention regarding the suit being time barred could not have been accepted by the Courts below nor can it be accepted here. Question No.2, therefore, is answered in the negative.

14. Coming to the contention that the Courts below could not have passed a decree of eviction having once held that the plaintiff is not the sole owner of the property, it may be noted that both the Courts below have considered this aspect with which this Court also agrees that the plaintiff could not be held to be sole owner of the suit property as he is not the sole successor of Parmanand Girdhar. He has a brother a four sisters, who were not party to the suit. This lack of sole ownership is to be construed qua his brother and sisters and not qua the defendants. The Trial Court in clear terms observed that the plaintiff's sisters have no interest in the suit but the plaintiff's brother has a right in the suit house as the plaintiff's father had expired before

1956 and, therefore, the contention raised by Mr. Gandhi cannot be accepted.

15. In view of the above discussion, the appeal cannot be accepted and it must fail. The appeal, therefore, stands dismissed. No costs.

16. In view of the dismissal of the appeal, stay of execution of decree, if any, in Civil Application No.3368 of 1983 would stand vacated.

[A.L. DAVE, J.]

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